MANHARLAL BHAICHAND GATHANI

v.

PERWIRA HABIB BANK MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-598-1997]
26 DECEMBER 2001

CIVIL PROCEDURE: *Amendment - Statement of claim - Whether amendment contrary to election and representation made to court - Whether amendment sought only to clarify ambiguity - Whether doctrine of election and estoppel applicable*

CIVIL PROCEDURE: *Appeal - Issue before court - Issue neither pleaded nor argued in courts below - Whether issue could be raised on appeal - General rule - Exceptions*

The respondent as plaintiff in the lower court applied to amend its statement of claim. The application was allowed by the senior assistant registrar ('SAR'). The appellant appealed to the judge in chambers and that was dismissed. The appellant now appealed before this court.

The issue was whether the respondent was barred by the doctrine of election and estoppel from amending its statement of claim to include a second guarantee against the appellant contrary to the election and representation made to court based only on a first guarantee.

Held:
Per Alauddin Mohd Sheriff JCA

[1] The issue before the court was not raised before the SAR nor the learned judge. It was raised for the first time. As a general rule, a new point cannot be raised in an appeal which was neither pleaded nor argued in the courts below. However, this rule is subject to certain exceptions. Firstly, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction. Secondly, the Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order. (p 454 c-d)

[1a] The present case did not come under any of the established exceptions. The new point raised was not one of jurisdiction or illegality. It was also not a mere omission which could be termed a technicality. The 'omission' was in fact a new line of defence altogether. The new defence based on election and equitable estoppel was never pleaded nor argued in the courts below. On that ground alone, this appeal could not succeed. (p 454 e-f)

[2] The amendment to the statement of claim sought to clarify that the respondent was in fact relying on both guarantees and to cure the ambiguity that only the first guarantee was being relied upon. The appellant was in no position to allege that it was unfair, unjust or unconscionable on the part of the respondent to amend its claim so as to clarify its position that it was relying on both guarantees especially so since the appellant had in fact taken steps to plead his defences in respect of both guarantees. Hence, the doctrine of election and estoppel had no place in this appeal. (p 456 a-c)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden sebagai plaintif dalam mahkamah rendah telah memohon untuk meminda pernyataan tuntutannya. Permohonan tersebut telah dibenarkan oleh Penolong Kanan Pendaftar ('SAR'). Perayu telah merayu kepada hakim di dalam kamar dan rayuan tersebut telah ditolak. Perayu kini merayu di hadapan mahkamah ini.

Isunya adalah sama ada responden telah dihalang oleh doctrin pemilihan dan estoppel daripada meminda pernyataan tuntutannya untuk memasukkan gerenti kedua terhadap perayu bertentangan dengan pemilihan dan representasi yang dibuat kepada mahkamah berdasarkan gerenti pertama sahaja.

Diputuskan:
Oleh Alauddin Mohd Sheriff HMR

[1] Isu di hadapan mahkamah telah tidak dibangkitkan di hadapan SAR mahupun di hadapan hakim yang bijaksana. Ianya telah dibangkitkan buat pertama kalinya. Sebagai satu kaedah am, sesuatu perkara baru tidak boleh dibangkitkan dalam sesuatu rayuan yang mana tidak diplidkan ataupun dihujahkan dalam mahkamah-mahkamah di bawah. Walaubagaimanapun, kaedah ini tertakluk kepada kekecualian-kekecualian yang tertentu. Pertamanya, bahawa perkara undang-

undang boleh diketengahkan buat pertama kalinya ketika rayuan jika ianya membangkitkan persoalan bidangkuasa. Keduanya, Mahkamah Rayuan akan melayan suatu perkara undang-undang yang tidak dibangkitkan dalam mahkamah di bawah jika ianya akan menyebabkan pembetulan sesuatu perintah yang salah.

[1a] Kes semasa tidak terlingkung di bawah mana-mana kekecualian-kekecualian tetap tersebut. Perkara baru yang dibangkitkan bukannya sesuatu mengenai bidangkuasa atau kepenyalahan undang-undang. Ianya juga bukan hanya suatu peninggalan yang boleh dianggapkan sebagai suatu kesilapan teknik. "Peninggalan" adalah pada hakikatnya suatu barisan pembelaan yang baru sama sekali. Pembelaan baru tersebut berdasarkan pemilihan dan estopel ekuiti tidak pernah diplidkan atau pun dihujahkan dalam mahkamah di bawah. Atas alasan-alasan itu sahaja, rayuan ini tidak akan berjaya.

[2] Pindaan pernyataan tuntutan cuba menjelaskan bahawa responden pada hakikatnya bergantung kepada kedua-dua gerenti dan memulihkan kekaburan bahawa responden hanya bergantung kepada gerenti pertama sahaja. Perayu tidak berada dalam kedudukan untuk mendakwa bahawa ianya adalah tidak adil, tidak berpatutan atau tidak munasabah untuk pihak responden meminda tuntutannya bagi menjelaskan kedudukannya bahawa ianya bergantung kepada kedua-dua gerenti sedemikian kerana perayu telah mengambil langkah-langkah untuk memplid pembelaan beliau berhubung dengan kedua-dua gerenti tersebut. Oleh itu, doktrin pemilihan dan estoppel tiada tempat dalam rayuan ini.

[Rayuan ditolak.]

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***

Kok Hoong v. Leong Cheong Kweng Mines [1964] 30 MLJ 49 ***(refd)***

Lai Yoke Ngan & Anor v. Chun Teck Kwee & Anor [1997] 3 CLJ 305 ***(foll)***

Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 ***(refd)***

Muniandy & Anor v. Muhammad Abdul Kader Muhamed Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 ***(foll)***

Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 ***(refd)***

For the appellant - Vasdey Bakshani & Assoc
For the respondent - Raja Darryl & Loh

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D5-22-1575-1992]

Reported by Usha Thiagarajah

JUDGMENT

Alauddin Mohd Sheriff JCA:

By way of a summons-in-chambers (encl. 140) dated 2 July 1997 the respondent who was the plaintiff in the court below applied to amend its statement of claim. The application was supported by the affidavit of Ong Boon Chak sworn on 28 June 1997 (encl. 141). The application was first heard by the learned senior assistant registrar who allowed the application on 5 August 1997. The appellant then appealed against that decision to the judge in chambers who dismissed the appeal on 15 September 1997. Hence the present appeal before us.

To put it in proper perspective, the matter was originally fixed for full trial before the learned judge on 12-17 June 1997. On the first day of trial ie, 12 June 1997 the appellant (defendant 3) applied for an adjournment so as to amend his defence. The appellant came to the trial with a proposed draft amended defence for the court's perusal. The respondent objected to the adjournment. The learned judge however, allowed the adjournment and ordered costs to be paid to the respondent.

On 2 July 1997 the respondent filed its application to amend its statement of claim. On 30 July 1997, the appellant filed his application to amend his defence in line with the draft amended defence which was given to the court on 12 June 1997.

On 5 August 1997, the respondent's application to amend the statement of claim was allowed by the senior assistant registrar. The appellant appealed against this order. On 15 September 1997, the appellant's appeal was dismissed by the learned judge. On 9 October 1997 he filed his appeal to the Court of Appeal against the judge's order dated 15 September 1997. On 25 September 1992 the appellant's application to amend his defence came up for mention. The appellant took the stand that as the respondent has been given leave to amend, the amendment to his defence would be as of right and therefore there would be no necessity for him to proceed with his application for leave to amend.

On 13 October 1997 the sealed amended statement of claim was served on the appellant's solicitors. On 22 October 1992 the appellant served his amended defence on the respondent's solicitors but reserved his right to proceed with his appeal to the Court of Appeal. The terms of the amended defence was identical to that stated in the appellant's application for leave to amend. Under the circumstances, on 25 May 1998 the appellant withdrew his application to amend his defence.

Before us, learned counsel for the appellant raised only one issue ie, whether the respondent is entitled to amend its statement of claim contrary to the election and representation made to court on 12 June 1997 to the effect that the respondent's claim was based only on the first guarantee and not the second guarantee.

It was further argued by learned counsel that the respondent by their very conduct, as evidenced by the Notes of Evidence (see pp. 165-167 of the AR), is clearly barred by the doctrine of election and estoppel from amending the statement of claim to include the second guarantee.

Further, learned counsel submitted that implicit in their representation to court on 12 June 1997, the respondent effectively abandoned their rights on the second guarantee. This was to a certain extent reiterated by the respondent in their affidavit (see p. 177 AR para 7). Relying on the respondent's election and representation the appellant filed his application to amend the defence but not before the respondent acted inconsistently with their representation made to the court on 12 June 1997. The respondent is therefore not entitled to approbate and reprobate nor 'blow hot and cold' on this issue. Counsel added that the amendment sought by the respondent had prejudiced the appellant, a prejudice that cannot be compensated with costs.

In support of his submission learned counsel cited the following cases:

(i) *Meng Leong Development Pte Ltd. v. Jip Hong Trading Co. Pte Ltd* [1985] 1 MLJ 7.

(ii) *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

(iii) *Lai Yoke Ngan & Anor v. Chun Teck Kwee & Anor* [1997] 3 CLJ 305.

(iv) *Kok Hoong v. Leong Cheong Kweng Mines* [1964] 30 MLJ 49.

We feel compelled to mention at this stage that from the very outset of his submission learned counsel for the appellant informed this court that he was not challenging nor complaining about the principles involved in an application

for amendment of pleadings as set out in the *Yamaha Motor* case. In other words, learned counsel conceded that both the SAR and the learned judge in deciding the application by the respondent had proceeded on the correct principles. However, the main thrust of his complaint is grounded on the issue of election and estoppel as mentioned earlier.

It must also be emphasised that this issue raised by learned counsel was never canvassed before the SAR nor the learned judge. It is being raised now for the first time. It was never introduced nor argued in the courts below. Can learned counsel be permitted to do this?

In *Muniandy & Anor v. Muhammad Abdul Kader s/o Muhamed Saheed & 2 Ors.* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116, the Supreme Court held that as a general rule, a new point cannot be raised in an appeal, which was not pleaded or argued in the courts below. However this rule is subject to certain exceptions. They are, first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction; and, secondly, the Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order. (See also *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9).

Relying on the above authority we must say, with the greatest of respect to learned counsel, that the present case does not come under any of the established exceptions. The new point raised is not one of jurisdiction or illegality. It is also not a mere omission which could be termed a technicality. The so-called 'omission' is in fact a new line of defence altogether. The new defence based on election and equitable estoppel was never pleaded or argued in the courts below.

For reasons stated we do not think this is an appropriate case where we should allow learned counsel for the appellant to argue a new line of defence. Based on this reason alone we say that this appeal cannot succeed. However, should our decision be found to be erroneous, we would proceed to consider the merits of the issue raised.

Is There Election And Is The Plaintiff Estopped From Amending Its Statement Of Claim?

It was contended by learned counsel for the appellant that learned counsel for the respondent had represented to them that he was only relying on the first guarantee when they appeared before the learned judge on the first day of hearing. He then referred to pp. 165-167 AR wherein the following record was made by the learned judge:

En. Chang:

Arahan saya adalah untuk membantah permohonan ini.

Alasan:

1. Bukanlah rahsia bahawa plaintif akan bergantung kepada guarantee yang pertama. Malah ini telah dikatakan semenjak tahun 1992. Pindaan ini patut dibuat lebih awal lagi.

2. Plaintif telah bersiap sedia untuk perbicaraan pada hari ini. Dalam pada ini 2 sapina telah pun diserahkan dan salah seorang daripada saksi adalah CEO kepada suatu bank commercial.

Penyata-penyata saksi telah pun sedia dan telah diserahkan dan apa-apa pindaan akan membawa akibat kepada pernyataan-pernyataan itu nanti.

Akhir sekali kos tidak akan dapat mempampaskan plaintiff kerana defenden (3) telah diisytiharkan bankrup di Singapura.

The reasons given for the amendment as stated in the respondent's supporting affidavit at p. 177 AR read as follows:

7. Walaupun sebenarnya Plaintiff berhasrat bergantung kepada geranti-geranti bertarikh 18hb. Oktober 1990 dan juga 15hb. April 1992 terhadap Defendan Ketiga, Plaintiff sanggup bergantung sahaja kepada gerenti bertarikh 18hb. Oktober 1990 jikalau perbicaraan penuh dapat berjalan seperti yang dijadualkan.

8. Oleh kerana perbicaraan telah pun ditangguhkan, maka Plaintif hendak meminda Pernyataan Tuntutannya supaya bergantung kepada geranti-geranti bertarikh 18hb Oktober 1990 dan juga 15hb April 1992. Sesalinan geranti-geranti di lampirkan di sini bertanda "OBC1".

From the above paragraphs it is clear to us that what the respondent meant was that they were prepared to rely only on the first guarantee if the hearing was not postponed on that day. There was no indication whatsoever that they would abandon the second guarantee. They were ready to proceed with the trial on 12 June 1997 but since the adjournment was ultimately allowed for the purpose of enabling the appellant to amend his defence can the respondent now be said to have elected to proceed on the first guarantee only and abandoned its right to amend the statement of claim so as to include the second guarantee? We do not think so. To our minds the reasons given by the respondent in the affidavit have explained what had actually transpired before the learned judge. There is no doubt that they are consistent with the record made by the learned judge at p. 177 AR.

The appellant who was sued as a guarantor had signed both guarantees (see pp. 191 to 198 RA). In his amended defence the amended parts pleaded defences in respect of both guarantees. (See p. 135 para 8 and p. 136 paras 8B and 10 RA). In our view the amendment to the statement of claim seeks merely to clarify that the respondent was in fact relying on both guarantees (See p. 115 para 13 RA) and to cure the ambiguity that only the first guarantee was being relied upon. The appellant is now in no position to allege that it is unfair, unjust or unconscionable on the part of the respondent to amend its claim so as to clarify its position that it is relying on both guarantees especially so since the appellant has in fact taken steps to plead his defences in respect of both guarantees.

Touching upon the doctrine of estoppel, the learned Gopal Sri Ram JCA in his judgment in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] CLJ 305, had this to say:

> The doctrine of estoppel is essentially equitable in nature. It is a rule by which justice is done according to the facts and circumstances of a particular case and its operation depends much upon the conduct of the parties. The global question which a Court must ask itself is this: is it just and equitable that the particular litigant (against whom the estoppel is raised) should succeed, given the totality of the facts and circumstances of the case? If the answer to that question is in the affirmative, estoppel does not bite: if the answer is in the negative, then it does.

Based on the above and taking into consideration the totality of the facts and circumstances of this appeal, we are of the view that the respondent should succeed. Hence we say that the doctrine of election and estoppel has no place in this appeal.

For reasons already stated the appeal is dismissed with costs both here and in the courts below. The deposit is to be paid to the respondents to account of taxed costs.

My learned brothers Denis Ong Jiew Fook and Mohd. Saari b. Yusoff JJCA who had the opportunity of reading this judgment in draft, had expressed their concurrence with this judgment.